INTERIOR BOARD OF INDIAN APPEALS

Erin Forest v. Sacramento Area Director, Bureau of Indian Affairs

18 IBIA 372 (07/19/1990)

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

ERIN FORREST
v.
SACRAMENTO AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 89-8-A Decided July 19, 1990

Appeal from a decision dismissing an appeal under 25 CFR Part 2 (1988) as untimely.

Dismissed.

1. Bureau of Indian Affairs: Appeals: Filing: Mandatory Time Limit

   An appeal from a Bureau of Indian Affairs decision under 25 CFR Part 2 (1988) is timely if the notice of appeal is filed within 30 days after the appellant's receipt of the decision being appealed.

2. Administrative Procedure: Administrative Review--Board of Indian Appeals: Generally

   The Board of Indian Appeals will not consider the merits of a moot appeal where there is no showing that it involves a potentially recurring question raised by a short term order, capable of repetition, yet evading review.

3. Board of Indian Appeals: Generally--Indians: Tribal Government: Constitutions, Bylaws, and Ordinances

   The Board of Indian Appeals undertakes to interpret tribal law only where there is a clear necessity for it to do so.

APPEARANCES: Bronson C. La Follette, Esq., and Joseph F. Preloznik, Esq., Madison, Wisconsin, for appellant; Stephen V. Quesenberry, Esq., Oakland, California, for the Pit River Tribal Council.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellant Erin Forrest seeks review of a November 3, 1988, decision of the Sacramento Area Director, Bureau of Indian Affairs (Area Director; BIA), dismissing as untimely an appeal filed on October 25, 1988, from a

September 9, 1988, decision of the Superintendent, Northern California Agency, BIA. The Superintendent's decision concerned a Pit River tribal election held on August 21, 1988. For the reasons discussed below, the Board dismisses this appeal.

Background

The Pit River Tribe has endured internal strife for a considerable period of time. A lawsuit involving some of the ongoing intra-tribal conflicts has been pending in the United States District Court for the Eastern District of California since 1975. Pit River Tribal Council v. Hodel, S-75-585-LKK (E.D. Calif.). Appellant is a defendant in that action.

The Tribe adopted a revised constitution on August 15, 1987. 1/ On August 22, 1987, the first election of officers under the new constitution was held. 2/ Betty George was elected Chairperson for a 2-year term. Other officers and tribal council members were also elected.

At the next annual meeting on August 21, 1988, another purported election was conducted, under confused and potentially confrontational conditions. Even though Ms. George had completed only 1 year of her 2-year term, appellant was elected Chairperson. Other officers and tribal council members were also elected.

By Resolution No. 88/08/05, dated August 24, 1988, the Tribal Council declared the August 21, 1988, election null and void and expressed an intention to "reschedule annual elections upon assurance that such elections can be conducted without threat or intimidation." By letter of September 9, 1988, to Ms. George, the Superintendent stated that he accepted Resolution No. 88/08/05 and agreed that the election was null and void. He noted, inter alia, that the election of a Chairperson was violative of the Tribe's constitution.

1/ The constitution was approved by the Assistant Secretary - Indian Affairs on Dec. 3, 1987.

2/ Article IX, section 1, provides: "First Election. The first election of officers under this Constitution shall be held at the August annual meeting of the Tribe following the ratification thereof. The officers serving under the Tribe's former Constitution when this Constitution is ratified shall continue in office until their successors are elected hereunder."

3/ Article VI, section 2, of the constitution provides in part: "The Tribal Chairman shall be elected for a term of two (2) years; all other officers shall be elected for a term of one (1) year. These positions shall be filled from and elected by the general membership at the annual meeting in August."

The Tribal Council also sought relief in Federal district court in the pending litigation, Pit River Tribal Council v. Hodel, supra. The court issued a temporary restraining order against appellant on August 22, 1988. On October 11, 1988, it issued a preliminary injunction. In its October 11 order, the court found as fact, inter alia, that

> 1. The office of Chairperson of the Pit River Tribe was not properly open to election on August 21, 1988, because the current Tribal Chairperson, Betty George, was entitled to serve until August 1989.
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> * * * * * *
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> 4. The traditional and customary voting procedures of the Tribe were ignored at the purported election, and attempts to verify the eligibility of voters in attendance were rejected by [appellant] and others.
>
> 5. Those enrolled Pit River Tribal members in attendance who objected to the manner in which the tribal elections were being conducted, including some elderly tribal members, felt threatened and intimidated by the tactics and demeanor of [appellant] and his supporters.
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> 6. The potential for physical confrontation and/or violence during the events of August 21, 1988 was real, as evidenced by the declarations submitted by some of those in attendance at the August 21 tribal meeting, and by the report prepared by [the] Shasta County Deputy Sheriff.

(Oct. 11, 1988, Order at 2-3).

The court concluded, as a matter of law, inter alia,

> [t]hat there appears to be no reason for the Court not to defer to the September 9, 1988 decision of the Bureau of Indian Affairs relative to the validity of actions taken at the August 21, 1988 meeting of the Pit River Tribe, a matter within the primary jurisdiction of the agency.

(Oct. 11, 1988, Order at 4).

It enjoined appellant from, inter alia,

> 1. Interfering with the lawful business and governmental operations of the Pit River Tribe and its duly elected governing body, the Pit River Tribal Council, including interference with the conduct of the annual election of Tribal Council representatives and officers of the Tribe;

> 2. Threatening, intimidating, harassing or otherwise interfering with members of the Pit River Tribal Council, as presently constituted under the elections held on August 22, 1987, in their conduct of Pit River tribal business.

(Oct. 11, 1988, Order at 5-6).

The court further ordered that

> [n]one of the above orders shall limit anyone from participating in any tribal election or business of the Pit River Tribe if they are otherwise qualified to do so under the Constitution and Ordinances of the Tribe, nor will it prevent anyone from seeking to have the proceedings occurring on August 21, 1988, recognized by the appropriate officials of the Bureau of Indian Affairs as a proper election of the Tribe, including an appeal of the Bureau of Indian Affairs decision of September 9, 1988.

(Oct. 11, 1988, order at 6-7). 4/

By letter of September 26, 1988, appellant asked the Superintendent to reconsider his September 9 letter. The Superintendent declined, informing appellant by letter of October 6 , 1988, that he could appeal by filing a notice of appeal within 30 days after September 9.

Appellant filed a notice of appeal dated October 19, 1988. On November 3, 1988, the Area Director dismissed his appeal as untimely. Appellant filed an appeal from this decision with the Assistant Secretary - Indian Affairs.

On January 12, 1989, the Board received a request from appellant to assume jurisdiction over this appeal under 25 CFR 2.19(b) (1988). 5/

4/ As far as the Board is aware, this order is still in effect. Although the Board ordered the parties to address in their briefs the relation between this appeal and the Federal court litigation, only the Tribal Council has done so. The Tribal Council argues that the Board is bound by the findings in the district court's Oct. 11, 1988, order (Tribal Council's Apr. 19, 1990, Letter at 2).

5/ 25 CFR 2.19 (1988) provided in relevant part:

"(a) Within 30 days after all time for pleadings (including extension granted) has expired, the Commissioner of Indian Affairs [or BIA official exercising the administrative review authority of the Commissioner] shall:

"(1) Render a written decision on the appeal, or

"(2) Refer the appeal to the Board of Indian Appeals for decision.

"(b) If no action is taken by the Commissioner within the 30-day time limit, the Board of Indian Appeals shall review and render the final decision."

Because it appeared that the request might be premature, the Board sought information concerning the status of the appeal from the Assistant Secretary - Indian Affairs. By memorandum of February 15, 1989, from the Acting Deputy to the Assistant Secretary - Indian Affairs (Tribal Services), the appeal was transferred to the Board. The appeal was docketed on March 7, 1989, and appellant filed an opening brief.

On June 27, 1989, proceedings were stayed at the request of the Tribal Council and appellant, who stated that settlement negotiations were under way in the Federal court litigation and that settlement of that litigation would include an agreement to dismiss this appeal. Proceedings remained stayed until March 12, 1990, when the Board issued an order for resumed briefing after being advised by the Tribal Council that settlement negotiations had failed. The Tribal Council thereafter filed a letter, stating, inter alia, that it believed this appeal was now moot in light of two tribal elections held subsequent to the August 21, 1988, election. Appellant filed a reply, contending that the appeal is not moot.

Discussion and Conclusions

[1] The Board first considers whether appellant's appeal to the Area Director was timely. If it was not, the Area Director correctly dismissed it, as he was required to do under 25 CFR 2.10 (1988). E.g., Cahoon v. Portland Area Director, 17 IBIA 187 (1989).

25 CFR 2.10(a) (1988) provided in part: "The notice of appeal must be received in the office of the official who made the decision within 30 days after the date notice of the decision complained of is received by the appellant." It is apparent that appellant had received the Superintendent's September 9, 1988, decision by September 26, 1988, the date of his letter requesting reconsideration of the decision. However, there is no evidence in the record to show that he received it before September 26. Therefore, the Board accepts September 26 as the date of appellant's receipt of the Superintendent's decision. His notice of appeal was received in the Area Office on October 25, 1988. 6/ Therefore, the Board finds that it was timely filed under 25 CFR 2.10(a) (1988). 7/

Under other circumstances, the Board would remand this case to the Area Director for a decision on the merits. However, for the reasons discussed

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6/ Although the record does not indicate the date on which the notice of appeal was received in the Superintendent's office, the office in which it was required to be filed, the Board assumes it was received there on or before Oct. 25.

7/ Appellant contends that he somehow tolled the appeal period by filing a request for reconsideration with the Superintendent. This contention is without merit. There was no provision in 25 CFR Part 2 (1988) for reconsideration of decisions. Cf. Stock West, Inc. v. Portland Area Director, 18 IBIA 7 (1989).

below, the Board finds that this appeal should be dismissed and that no purpose would be served by remanding the case for further proceedings.

The Tribal Council enacted an enrollment ordinance (Ordinance No. 88-1) and an election ordinance (Ordinance No. 88-2) on September 22, 1988. On February 18, 1989, a tribal election was held, after having been rescheduled from August 21, 1988. Appellant, who had been enrolled under the now enrollment ordinance, participated in that election and was elected to a position on the Tribal Council. On August 19, 1989, the next annual election was held. The office of Chairperson was open. Appellant did not run for Chairperson but ran again for the Tribal Council and was again elected. Appellant did not contest the validity of either election.

In this appeal, appellant seeks to be recognized as Chairperson pursuant to the August 21, 1988, election. However, another Chairperson was elected in August 1989, and appellant has, by failing to contest that election, recognized its validity. Under these circumstances, it is apparent that this appeal is now moot. While appellant contends that it is not he articulates no clear reason why it is not.

[2, 3] The doctrine of mootness normally precludes the consideration of moot issues. While the Board recognizes an exception to the mootness doctrine where there is a potentially recurring question capable of repetition yet evading review, it has never invoked this exception in cases like the present one. In Sahmaunt v. Anadarko Area Director, 17 IBIA 60 (1989), the Board declined to invoke the exception in a case involving a tribal election dispute where a subsequent election had taken place, in which the appellant participated. The Board found in that case that there was no reasonable expectation the actions complained of would recur. Further, it stated:

> [T]he dispute which gave rise to the appeal was an internal tribal matter and involved the interpretation of a provision of the tribal constitution. The Board undertakes to interpret tribal law only where there is a clear necessity to do so; it has declined to invoke the exception to the mootness doctrine where, in order to render a decision on the merits, it would have been required to interpret tribal law. Fort McDermitt Paiute Shoshone Tribe v. Acting Phoenix Area Director, 16 IBIA 221 (1988).

In this case, the enactment of enrollment and election ordinances has removed at least some of the uncertainty that contributed to the confused state of affairs on August 21, 1988. The situation now is clearly different than it was in August 1988. While there is no guarantee that another election dispute will not occur, a decision in the instant case, based, as it would be, on superseded law and facts, would have no particular relevance to future disputes.

For these reasons, the Board declines to invoke the exception to the mootness doctrine in this case.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, this appeal is dismissed as moot.

//original signed
Anita Vogt
Administrative Judge

I concur:

//original signed
Kathryn A. Lynn
Chief Administrative Judge

8/ On July 2, 1990, while this case was under active consideration, the Board received a petition to intervene from Jessica E. Jim and George Montgomery, Pit River tribal members. The petition is denied.